Making Cooperation Work:

Informal Governance in the EU and Beyond

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Abstract: This article develops a theory of informal governance – uncodified rules of behavior running parallel to formal treaty rules – in international institutions. It builds on, and develops, rational institutionalist approaches in International Relations that explore how provisions for flexibility allow states sustain cooperation in the face of change in their strategic environment. The central argument advanced in this article is that in order to maintain a mutually beneficial depth of cooperation, governments devise, in parallel with formal rules, a "norm of discretion" prescribing that governments facing unmanageable pressure for defection be accommodated. Because some government face incentives to exploit this norm, the task of adjudicating its use is delegated to a government that stands to lose from excessive accommodation. The norm consequently manifests itself in practices of informal governance as states collectively depart from formal rules in order to exercise discretion. The resulting mix of informal and formal governance is functional in that it renders the institution dynamic and therefore adaptable to contingent domestic demands for cooperation. The plausibility of the theory is probed using the example of European economic integration, but it can be extended to international organizations more broadly.

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Introduction

Informal governance abounds in the European Union (EU), arguably the deepest form of institutionalized cooperation to date. It is not simply that countries deviate from formal rules. At the heart of Europe are uncodified rules that run parallel to formal treaty rules, yet differ from them substantially. Nearly every textbook tells us that formal treaty rules grant the European Commission a monopoly of initiative, yet the Commission usually only acts upon request from the governments. Formal rules stipulate that governments adopt legislative proposals by majority voting, yet governments rarely ever vote, reaching consensual decisions instead. Formal treaty rules afford the Commission high discretion in implementing many policies, yet hundreds of informal committees keep a close check on the Commission's work.

Why do governments depart from the formal rules they designed with foresight? To answer this question this article builds on and develops the literature in international relations, economics and law on cooperation when states are uncertain about future domestic demands for protection ("domestic uncertainty"). This literature shows that because sudden defection by a cooperating partner triggers the unraveling of mutually beneficial cooperation, domestic uncertainty creates a demand for added flexibility in the enforcement of formal rules. All members can be made better off when they authorize exceptional defection, because it allows them to maintain a depth of cooperation that otherwise would prove unsustainable. States therefore use flexibility mechanisms to enhance the robustness of their institution. The theory advanced in this article develops this literature in two important regards. First, it argues that domestic uncertainty generates a demand for flexibility not just in the enforcement of formal rules, but also in the making of common policies within a formal institutional framework. Second, it goes beyond the analysis of formal rules by studying the role of informal institutional elements in the provision of flexibility.²

The central argument in this article is that under conditions of domestic uncertainty, governments "make cooperation work" by devising an informal norm of discretion in parallel to formal rules. This norm prescribes that governments accommodate a cooperating partner in the event that an unreserved application of the formal rules threatens to generate unmanageable pressure for defection. They thus forego short-term gains in order to reap joint welfare gains from an otherwise unsustainable level of cooperation. The norm manifests itself in two observable ways. First, governments adopt practices of informal governance in issue-areas of high domestic uncertainty as they collectively depart from formal rules in order to exercise discretion. However, the norm generates moral hazard in that governments will be tempted to demand accommodation even when the domestic pressure they face at home is perfectly manageable. The second observable aspect of the norm is that states, in response to moral hazard, delegate the task of adjudicating the use of discretion to another government that stands to lose from the excessive accommodation of a cooperating partner.

The resulting mix of formal rules and informal governance is therefore functional, because it allows states to maintain a depth of cooperation in a way that neither formal rules nor informal norms alone permit. The theory consequently modifies older, more static formulations of regime theory by making explicit the "liberal" aspect of neoliberal institutionalism: for international institutions to be effective, they must remain embedded in the varied national interests and values of the societies that form their constituent parts,³ and so when these change, effective institutions

² Institutions (regimes) are intervening variables and defined as "explicit or implicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area" (Krasner 1982, 185). ³ The norm can be regarded as a rational version of what Ruggie (1982, 399) called the norm of *embedded liberalism*,

the essence of which is "to devise a form of multilateralism that is compatible with the requirements of domestic stability. [Governments] encourage an international division of labor which, while multilateral in form and reflecting

must, to a certain extent, change with them.⁴ Because of this emphasis on domestic preferences, the theory will henceforth be referred to as Liberal Regime Theory (LRT). Its plausibility is tested as applied to European integration from 1958 until the present day. The next two sections introduce the theory in more detail and operationalize it for the institutional context of the EU. They set the stage for an empirical analysis in the two subsequent sections, which trace the norm of discretion throughout the history of European integration. The article concludes with further remarks on the generalizability of these findings and their implications for the study of international institutions in Europe and beyond.

Liberal Regime Theory

The core argument of this article – that informal governance allows governments to sustain cooperation in the face of domestic uncertainty – is developed in four steps. First, it is explained why states choose to cooperate within the framework of formal institutions. The second step subsequently discusses why domestic uncertainty renders formal institutions inadequate and generates a demand for added flexibility. Third, we explore the strengths and weaknesses of alternative flexibility provisions. Finally, it is explained why domestic uncertainty translates into a demand for an informal norm of discretion parallel to formal rules.

Why states create formal institutions

In situations of interdependence, where the realization of one's interests is dependent on another actor's behavior, institutions can be critical for actors to capture gains from cooperation. Key to understanding how institutions work is uncertainty about the future. If one suspects a cooperating partner will renege on the promise to reciprocate in the mutual adjustment of policies, cooperation becomes untenable even under the long shadow of the future. This obstacle to cooperation is particularly acute if we allow for preferences changing over time. Following public choice theory, the welfare of politicians is determined by their domestic political support. Governments consequently choose the policy that maximizes their political support measured as the weighted sum, firstly, of electoral support (from the median voter) for welfare gains from economic liberalization and, secondly, of rents from special interest groups in exchange for protection.⁵ This opportunism subjects governments to constant pressure from societal groups to pursue the policy that most closely matches their diverse interests. The result is time-inconsistent preferences as governments respond to changing societal pressures. Since time-inconsistent preferences render pledges to a cooperating partner incredible, all governments end up worse off because they forfeit joint welfare gains from cooperation.

For governments to reap joint gains under this condition, they need to find ways to bolster the credibility of their commitment to cooperation. Two aspects of formal institutional rules are particularly important in this regard. First, precise rules that specify conduct in contingent situations enable states to discriminate more clearly between defection and cooperation, on which basis they are then able to sanction rule violations.⁶ Second, rules that delegate authority to

some notion of comparative advantage (and therefore gains from trade), *also* promised to minimize socially disruptive domestic adjustment costs [...]".

⁴ Moravcsik 1997, 536.

⁵ Grossman and Helpman 1994, 836.

⁶ Abbott, et al. 2000, 28-31.

international organizations to make and enforce common policies make defection more costly, because delegation *inter alia* narrows the range of policy instruments that could be used to renege on cooperation,⁷ and it insulates decision makers from ad-hoc pressure.⁸ Thus, formal rules align potentially volatile incentives *ex ante* in such a way that individual governments can be expected to generally prefer cooperation to defection. As a result, formal rules enable cooperation as they allow all partners to form stable expectations about each other's future behavior. At the same time, these rules allow private actors to form expectations about future policies and thus to plan ahead and allocate resources more efficiently.⁹

Why formal institutions prove inadequate

International institutions have to be self-enforcing to be sustainable. An institution's effect therefore has to be as such as to constantly reinforce states' interests in adhering to it. Yet exactly because governments are unable to predict their future societal interdependence, which gives rise to institutions to begin with, they are also unable to predict an institution's precise future effect. As Kenneth Shepsle put it, "what can be anticipated in advance is that there will be unforeseen contingencies."¹⁰ This gives reason to doubt institutions' lasting, independent effect on state behavior. Once they are set up, institutions may face unanticipated changes in underlying patterns of interdependence (e.g. due to technological innovation, demand and supply shocks etc.) that alter the distribution of the domestic costs and benefits of international cooperation. Situations are therefore bound to arise where a strict adherence to the letter of the law, even if beneficial for a society as a whole, generates unexpected concentrated adjustment costs, material or ideational, for one of its segments. Since in the politics of collective action groups that incur concentrated losses have advantages over those with diffuse benefits,¹¹ the group that faces concentrated costs from cooperation suddenly overcomes initial barriers to mobilization. As a consequence, it is able to pressure its government into obstructing¹² or openly defying the formal rules that embody the state's commitment to cooperation – a problem commonly referred to as "domestic uncertainty".¹³ An unexpected rule violation like this sets off a process that all governments would rather avoid – the credibility of commitments to cooperation sustains severe damage and stable expectations about each other's future behavior crumble, which ultimately triggers the unraveling of mutually beneficial cooperation.

Alternative institutional solutions to domestic uncertainty

Under conditions of domestic uncertainty, all governments prefer institutions that add flexibility to formal rules in order to disperse their domestic distributive effects. By lending political support to a cooperating partner under unmanageable domestic pressure, they uphold stable expectations about each other's cooperative behavior and, thus, reap joint gains from a level of cooperation that they would otherwise not be able to sustain. At the same time, in order to reap these joint gains, they must avoid this added flexibility undermining the credibility of their commitment, embodied by the formal rules. The literature in international relations, law and economics emphasizes two

⁷ This makes defection more costly when these instruments are not perfect substitutes. See Copeland 1990, 86.

⁸ E.g. Hawkins, et al. 2006, 18-19.

⁹ Maggi and Rodriguez-Clare 1998, 576-577.

¹⁰ Shepsle 1989, 141.

¹¹ Olson 1965, chaps 1 and 6.

¹² On obfuscated defection see Kono 2006, 370-371.

¹³ Downs and Rocke 1995, chap 4. On systemic uncertainty see e.g. Koremenos 2005.

ideal-typical ways to square the circle of flexibility and credibility: unilateral escape in predefined exceptional circumstances and third-party authorization of situational discretion.¹⁴ However, both fall short of striking an optimal balance between flexibility and credibility.

First, treaties commonly authorize unilateral departures from formal rules in the event of unforeseen developments. For example, the European Convention on Human Rights authorizes states to compromise civil rights in the interest of national security. Similarly, Article XIX of the General Agreement on Tariffs and Trade formerly authorized temporary protection in the case of import surges threatening to cause serious injury to domestic industries, although this would otherwise have been a violation of the agreement. However, the domestic conditions (e.g. "serious injury") that entitle a country to invoke these clauses may not be perfectly observable to its cooperating partners. Governments consequently face incentives to misuse the clause at their partners' expense – a classical problem of moral hazard.¹⁵ Rosendorff and Milner, among others, argue on the basis of a formal model that states combine escape clauses with "optimal penalties" that are set low enough to encourage the use of the clause, but also high enough to prevent governments from overusing it.¹⁶ However, this institutional solution becomes less adequate with increasing domestic uncertainty. Since domestic uncertainty lies by definition beyond the realm of things that states can predict when they design formal institutions, the specification of exceptional circumstances as well as the size of a penalty may always turn out to be inadequate. In addition, formal escape clauses generate the behavior they are supposed to nip in the bud, since the prospect of authorized protection induces domestic groups to pressure their government into invoking the clause when they would otherwise have sought to adjust to economic change.¹⁷ As a result, provisions for unilateral escape cannot entirely prevent the undermining of commitments.

A second solution to domestic uncertainty is third-party adjudication of discretion in the application of formal rules. The Dispute Settlement Understanding of the World Trade Organization (WTO), under which the Appellate Body assesses the legitimacy of a country's use of the aforementioned safeguard clause, is a case in point.¹⁸ However, this institutional solution is less adequate when domestic processes of preference formation are difficult to observe. For the third party to make a judgment on the adequate amount of discretion, it requires accurate situational information about the domestic interest group pressure that a government is facing – information that is not free of cost. Yet without immediate gains from maintaining a deeper level of cooperation, third parties have no incentive to bear the costs of collecting information.¹⁹ Their judgment is therefore likely to cause error and delay in the provision of flexibility.²⁰ Thus, this second institutional solution is also ill-suited to maintaining the credibility of mutual commitments while adding flexibility to formal rules.

A mix of formal rules and an informal norm of discretion

¹⁴ See e.g. Schwartz and Sykes 2002, 181-183, Shepsle 2006, 1042-1047.

¹⁵ Arrow 1963, 961. Shavell (1979, 541) discusses two solutions to moral hazard: *ex ante* "incomplete coverage" that deters reckless behavior, and *ex post* "observation" in order to identify illegitimate claims.

¹⁶ Rosendorff and Milner 2001, 835, 840-842. Cf. Bagwell and Staiger 1990, 779-780, Downs and Rocke 1995, chap 4, Sykes 1991, 259.

¹⁷ Goldstein and Martin 2000, 622, Sykes 1991, 259

¹⁸ Schwartz and Sykes 2002, 188-189.

¹⁹ As Dai (2007) points out, although information provision is at the heart of neoliberal institutionalism, little effort has been made to explain how institutions increase the amount of information available.

²⁰ Similarly Friedmann 1989, 6, Schwartz and Sykes 2002, 182.

The third solution advanced in this article is that governments devise a norm of discretion that exists alongside formal rules, prescribing that governments collectively accommodate cooperating partners when these partners face unmanageable interest group pressure for defection. This builds on the insight that in situations where one actor faces strong incentives to renege on its side of a deal, all parties to the agreement can be made better off if this actor secures permission to break its promise in exchange for a payment of no less than the value of the harm it causes.²¹ In the case of decision-making, a government in distress asks for situational discretion in the application of the formal rules with a view to dispersing the concentrated adjustment costs that the decision would otherwise cause. Instead of specific payments for expectation damages in exchange for lending political support to the claimant, governments reap welfare gains from a level of cooperation that is deeper than they would otherwise be able to sustain. In addition, they can expect to be granted the same support in the event of facing a similar situation. The result is diffuse reciprocity in political support that serves to maintain the greatest possible depth of cooperation under conditions of domestic uncertainty.²² The norm manifests itself in practices of informal governance as governments collectively depart from formal decision-making rules in order to exercise discretion.

Yet, just as in the cases above, governments have to find a way to deal with the problem of moral hazard. To that end, they require situational information about the actual extent of the interest group pressure that a claimant government is facing. As all governments, in contrast to a third party, have a direct incentive to bear the costs associated with collecting accurate information, the task of adjudicating on the appropriate amount of discretion can in principle be delegated to one of them.²³ However, not all governments can be expected to report correctly – although they all have an incentive to grant just enough discretion to render interest group pressure manageable, some of them may gain individually as a side effect of making excessive concessions. They consequently have an incentive to collude with the claimant government and recommend far more discretion than is actually needed. In contrast, the information provided by a government that forgoes short-term gains when granting discretion can be trusted, because the only reason why this government would suggest a certain measure of discretion must be that it seeks to sustain and reap gains from a deeper level of cooperation.²⁴ The norm of discretion in combination with adjudication by a government that stands to lose from excessive accommodation consequently adds flexibility to formal rules without undermining the credible commitment that these rules embody.

Studying the norm of discretion

The previous section made a functional argument about how domestic uncertainty generates a demand for a norm of discretion existing alongside formal rules. This section now lays out an analytical approach to studying the norm in the context of the European Community (EC), in many ways the predecessor of today's EU.²⁵ Generally speaking, studying institutions, formal or informal, poses a great challenge due to the problem of equifinality – because repeated interaction

²¹ This "efficient breach" literature builds on Coase's (1960) theorem about the efficiency of decentralized bargaining over externalities. ²² Keohane 1986, 8.

²³ This proposition is based on the assumption that joint gains from a greater depth of cooperation generally exceed individual losses from discretion.

²⁴ Ssimilarly e.g. Gilligan and Krehbiel 1989, 463, Krehbiel 1991, 82.

²⁵ The EU (established in 1992) legally absorbed the EC with the 2009 Lisbon Treaty.

sustains multiple equilibria, each of which has various observable elements, it follows that any observed institutional feature can always also be generated by an entirely different institutional equilibrium than the one proposed by the theory.²⁶ It is hence imperative to deduce more than one observable implication from the theory so that, used in conjunction, they increase confidence in the results.

This study capitalizes on the fact that the norm of discretion, although informal, generates more than one practice that can be observed (see figure 1 below). First, because domestic uncertainty gives rise to the norm of discretion in decision-making, governments can be expected to adopt practices of informal governance where domestic uncertainty is high and to follow formal rules where domestic uncertainty is low. Second, the norm is systematically accompanied by the delegation of adjudication to another government that stands to lose from making excessive concessions in the short run

Figure 1

Since informal governance is by definition dependent on the existing set of formal rules, we begin with a simplified description of the EC's formal rules before we operationalize the theory with regard to its particular institutional framework. The final part of this section discusses alternative explanations for the practices we expect to observe.

Formal rules and informal governance in the European Community

The roots of today's EU of twenty-seven member states lie in the European Economic Community,²⁷ which France, Germany, Italy, and the Benelux countries committed to establish with the 1958 Treaty of Rome (ToR). At its core was the objective of establishing a common market that would consist of policies governing agriculture, transport and competition, and the free circulation of goods, capital, services, and labor ("four freedoms"). This commitment was taken a step further with the 1987 Single European Act, with which the then twelve member states pledged to establish a single market, an area in which the free circulation of the four factors of production would be as easy between the member states as within them. This objective required the removal or harmonization of non-tariff barriers such as domestic regulations and even taxes. Its implementation promised to subject governments to various societal pressures, thus making time-inconsistency in preferences an important issue.

How did member states bolster their commitment in the face of time-inconsistent preferences? As discussed above, rules reinforce commitments through precision and delegation. However, the treaties, commonly referred to as "framework treaties", were very imprecise regarding what was required to achieve the single market. The realization of this objective would therefore necessitate a series of future individual decisions, the making and implementation of which the treaties delegated to a set of supranational institutions. The formal rules on delegation strongly insulated these institutions from ad-hoc pressure by endowing them with extraordinary power over decisionmaking outcomes. The result is an original legislative procedure, the so-called "Community Method", which almost invariably governs all EC issue-areas. It brings together a Council (composed of government ministers), a Commission (an independent bureaucracy), and the

 ²⁶ See Greif 2006, chap 11.
 ²⁷ In 1965, it was institutionally merged with the European Coal and Steel Community and Euratom to form the EC.

European Parliament (EP, composed of national and later on directly elected parliamentarians). The Community Method consists of three stages: agenda setting, voting, and implementation.

Agenda setting. The Commission has the *exclusive* (as opposed to a shared) right of initiative. This monopoly grants the Commission a strong political role: (a) it chooses one among many feasible proposals for a legal act and (b) determines the timing of its submission.²⁸

Voting. After submission, the Council decides whether to adopt or change the Commission proposal. The voting rules strongly privilege the first option and thus greatly augment the Commission's agenda-setting power: While a qualified majority vote (QMV) is sufficient for an immediate adoption of the proposal, the Council needs to attain unanimity in order to amend it against the Commission's will.²⁹ The EP, which was initially to be consulted before adoption,³⁰ has been gradually empowered to co-legislator status with veto power over Council decisions.³¹

Implementation. In matters of competition, the common trade policy, transport and agriculture, the treaty stipulates direct delegation to the Commission. On other matters, the legislators are free to delegate implementation powers to the Commission or to national administrations on other matters.³² Once delegated, the Rome Treaty provides no means for the Council to change or withdraw effective measures.

Formal governance in the context of the EC consists therefore of practices that permit the Commission to choose freely the content and the timing of its legislative proposal; the frequent overruling of recalcitrant governments in the Council; and the unrestricted implementation of legal At the opposite end of the continuum between formal and informal governance, acts. governments frequently depart from this behavior in order to exercise discretion. Specifically, informal governance involves collective practices that allow governments to predetermine the content and timing of legislative proposals; agree consensual changes to Commission proposals where rules provide for QMV; and enforce ex post restriction of the implementing actor's discretion.

Variation in informal governance

This specification of formal and informal governance now allows us to operationalize LRT for the institutional context of the EC. To repeat, LRT argues that domestic uncertainty gives rise to a norm of discretion, which in turn manifests itself in practices of informal governance. Accordingly, governments can be expected to adopt practices of informal governance where domestic uncertainty is high. Conversely, they will follow formal rules where domestic uncertainty is low.

Where is domestic uncertainty high and where is it low? Since domestic uncertainty lies by definition beyond what is precisely measureable (else governments would be able to design optimal formal institutions), we need to develop a proxy for this variable. Recall that the

³¹ Since the late 1990s, the EP and Council negotiate (culminating in a conciliation committee) an outcome, at which stage the Commission can no longer withdraw or change its proposal.

²⁸ Article 149 ToR.

²⁹ Article 148 ToR. QMV was introduced stepwise until the end of the transition period in 1970 and its scope gradually extended to other articles. ³⁰ Article 137 ToR.

³² Article 155 ToR.

challenge to formal rules arises because a domestic group faces unexpected concentrated adjustment costs. The prospect of this loss then induces the group to overcome initial barriers to mobilization in order to pressure its government for protection. Domestic uncertainty therefore depends on the domestic politics of collective action. It is attenuated when there are arrangements in place that generally disperse concentrated costs over a larger group of people, because this reduces actors' marginal gains from mobilization against cooperation. Everything else being equal, unmanageable pressure for defection is less likely in the presence of welfare schemes, which means that these schemes are suitable proxies for domestic uncertainty.³³ Thus, domestic uncertainty and the demand for a norm of discretion are relatively higher where welfare schemes are absent. As a result, domestic uncertainty can vary across issue-areas and over time with the level of protection that a sector receives. In addition, it varies across countries as governments with strong welfare schemes have less demand for discretion than countries with weaker schemes.

Importantly, domestic uncertainty varies predictably over time and across issue-areas in the EC. While the EC gradually subjected other sectors to greater competition, its Common Agricultural Policy (CAP), by means of fixed prices and subsidies, has deliberately and excessively sheltered European farmers from unexpected adjustment costs.³⁴ The CAP has therefore always been exceptional in that its domestic uncertainty is consistently lower than in any other issue-area with similar formal rules. To be sure, low domestic uncertainty does not mean that European farmers never mobilize against CAP decisions. It means that the timing and extent of their mobilization has always been fully predictable and manageable within the given set of formal rules. We therefore expect the CAP to be a consistent, strong exception to the phenomenon of informal governance, in that governments follow formal rules more frequently in the CAP than in any other EC issue-area.

Hypothesis 1 – Variation in informal governance in the EC. Governments follow formal rules in the CAP where domestic uncertainty is low whereas they consistently adopt practices of informal governance (see above) in all other EC issue-areas where domestic uncertainty is relatively higher.

Discretion and adjudication

For the norm of discretion to be sustainable in the face of moral hazard, governments require accurate situational information about the actual extent of domestic interest group pressure. To recap, LRT argues that governments delegate the task of adjudicating on discretion to a government that stands to lose from excessive concessions. This government consequently assumes a central role in decision-making. Yet this institutional solution appears prohibitively cumbersome in light of the hundreds of legislative acts that are annually adopted in the context of the EC, because it would require governments to be perpetually engaged in the process of delegating, for each individual issue, to the government with the right incentives. However, the plethora of legal acts suggests an alternative solution: instead of delegating adjudication to different governments, they can also create the conditions necessary for a single government to

³³ This draws on the "compensation hypothesis" (see Cameron 1978, 1249-1251, Katzenstein 1985, chap 2). For empirical tests see Kim 2007, 193-210, Rodrik 1998, 998. Welfare schemes are only partly endogenous to external risk so that they can independently alter the extent of domestic uncertainty.

³⁴ See Rieger 2005, 167-170. One might object that the agricultural sector is particularly risk-prone and requires more protection than other sectors. Yet, recent reforms notwithstanding, the level of protection in the CAP goes far beyond what can be considered efficient.

fulfill its adjudicatory function. This requires all governments to drop issues from the legislative agenda on which this one government faces an incentive to collude with the country claiming accommodation. The Rome Treaty already singles out one government to assume a more central role in decision-making: it provides for a Council Presidency, a position rotating among governments on a six-monthly basis, with the innocuous tasks of chairing meetings between ministers. The second hypothesis derived from LRT regarding adjudication therefore predicts the following practice:

Hypothesis 2 – Adjudication in the EC. The Presidency assumes a central role in decision-making in response to the norm of discretion. Governments drop issues from the agenda where the Presidency has an incentive to collude with a claimant government.

Alternative explanations for informal governance and adjudication in the EC

As mentioned above, single institutional elements can always also be generated by entirely different equilibria, which is why we deduced more than one observable implication from LRT. In order to increase the confidence in our findings even further, these predictions are also tested against alternative explanations for similar practices of informal governance as formulated by power-based and classic regime theoretical approaches to cooperation.³⁵

Randall Stone provides an elegant power-based explanation for informal governance. Because powerful states often have viable outside options to institutionalized cooperation that they may suddenly be tempted to exercise, the argument goes that small states offer them a deal that keeps them on board in the long run. In exchange for more favorable formal voting rights, small states agree to tolerate practices of informal governance that permit large states to shake off institutional constraints in the event that they consider their vital interests jeopardized.³⁶ These deals must be expected to take place in issue-areas that are of predictably high sensitivity to powerful states. Applied to the EC, this theory would in contrast to LRT expect informal governance to arise in the CAP, an issue-area of predictably high sensitivity – it has caused almost every major dispute in the history of European integration. Additionally, this power-based explanation would not expect large states to subject their use of informal governance to adjudication by another government.

From the perspective of classic regime theory, institutions enable cooperation by reducing the relative costs of transactions.³⁷ Institutions consequently lose balance when exogenous factors alter transaction costs after the fact, in which case states fix the resulting disequilibrium through practices of informal governance. For example, Jonas Tallberg argues that transaction costs associated with complex intergovernmental bargaining create a demand for one of the states to manage the legislative agenda and chair negotiations. Applied to the EC, he claims that a leap in legislative activity and the influx of additional actors heavily increased the complexity of decision-making in the late 1960s (see graph 1 below) and early 1970s. This generated a demand for the Presidency to assume a more central role in order to reduce the transaction costs in

³⁵ Historical institutionalists offer another alternative view, arguing that the complexity of modern economies generates unanticipated disequilibria that states find difficult to rebalance. Scholars in the neo-functionalist tradition add that institutional actors are quick to exploit these loopholes informally, at governments' expense (Farrell and Héritier 2007, 228, Pierson 1996, 132-139). This approach has yet to be operationalized by its proponents in order to be put to a test. Since the argument is based on the notion of complexity, it at most predicts an erratic rather than a systematic emergence of informal governance – a prediction that does not hold true in our case.
³⁶ Stone 2009, 13.

³⁷ Keohane 1984, 89-92.

intergovernmental negotiations.³⁸ As these developments affected all issue-areas, this theory would – in contrast to LRT – predict a general increase in informal governance from the late 1960s onwards.

Informal governance in the EC's legislative process

Having operationalized LRT for the institutional context of the EC, we now describe the emergence of informal governance in order to demonstrate that it varies systematically across issue-areas with the extent of domestic uncertainty. Governments follow formal rules more frequently when domestic uncertainty is low, as in the CAP, while they adopt practices of informal governance in all other EC issue-areas where domestic uncertainty is comparatively much higher. This first hypothesis is entirely at odds with the power-based explanation, which expects informal governance to arise in issue-areas that are of predictable sensitivity to large states, as is the case with the CAP. From the perspective of classic regime theory, informal governance should emerge in all issue-areas in response to a general increase in complexity in decision-making from the late 1960s onwards.

Since a full description of all practices of informal governance is beyond the scope of this article, the section begins with a cursory overview of informal governance in agenda setting and implementation before it focuses on the pivotal decision-making stage, voting. Voting is pivotal because if governments search for a consensus despite the treaty providing for QMV, they significantly narrow the set of proposals that the Commission can get through the Council and, by the same token, limit the EP's bargaining power. Unfortunately, official "count data" on voting in the Council are very scarce. The analysis therefore draws on new archival material, complemented with reports from contemporary practitioners and semi-official statistics.³⁹

Informal governance in the EC's legislative process: a cursory overview

According to the first Commission president, Walter Hallstein, agenda setting

[...] is eminently a political act. In the first place, it is a political act to select one of a number of possible measures: with due regard to what, on a realistic view, is likely to obtain the Council majority required by the treaty, the Commission chooses in complete independence the solution it considers most in line with the Community interest. Deciding on the timing of the proposal is also a political act: what was impossible yesterday may perhaps be possible today and imperative tomorrow.⁴⁰

Yet the Commission quickly lost grip of these agenda-setting powers. Firstly, the Heads of State and Government soon restricted the Commission's room for maneuver by predetermining the legislative agenda. Although the Heads of State and Government had no official place in the EC, they met with increasing frequency at "summits" (later referred to as European Councils) to decide important matters and give further instructions to both Commission and Council. Secondly, the governments resumed control of the timing of the legislative agenda, because they refused to deal officially with Commission proposals immediately after their submission. Instead,

³⁸ Tallberg 2010, 261, 250.

³⁹ The data are available from the author upon request.

⁴⁰ Hallstein 1965.

these proposals were referred immediately to government experts within a large informal substructure of hundreds of working groups and committees. The consequence of this practice was that the Commission lost control of the Council's legislative agenda, as Christoph Sasse, a senior Commission official, explains:

Constitutional reality diverged [from the legal constitution]. The Commission still prepares proposals, more often than not with the influential assistance of governmental experts. However, whether the Council deals with the proposal, and when and with which content they are adopted, is no longer, or barely, in the Commission's hands. The work rhythm no longer depends on the Commission [...]. It is depends [on the] progress of national bureaucrats [...].^{"41}

The formal rules stipulate that after the Commission submits its proposal to the Council, the governments (and later on jointly with the EP) adopt it with a qualified majority vote and may only change it if they are able to attain unanimity. As discussed below in more detail, the informal Council substructure served to build consensual outcomes among governments even where the treaty provides for QMV. The government experts were from the outset instructed to prepare decisions in such a way that the next higher level was willing to adopt them without further discussion. Working groups hence came to submit (as so-called Roman I-Points) preliminary consensual decisions to Coreper (Comité des représentants permanents) at the ambassadorial level. Coreper, in turn, prepares consensual decisions (so-called A-Points) for the ministers in the Council, who usually adopt them *en bloc* without further debate.⁴² To this day, the ministers adopt an estimated number of eighty to ninety percent of all legal acts as A-Points.⁴³ Accordingly, the intensity of negotiations in the substructure rose with the rise in the annual adoption of legal acts (see graph 1). However, this substructure is less developed in the CAP, which insulated itself from this *modus operandi* from the outset. Agricultural working groups take few preliminary decisions (there is no equivalent to the Roman I-Point procedure) and a Special Committee for Agriculture, consisting of delegates from the agricultural ministries, rather than Coreper, prepares decisions and reports directly to the agricultural ministers.⁴⁴

Graph 1

The EP was implicated in informal governance as soon as it gained serious legislative powers in the mid-1990s. Because the Council was reluctant to engage it in open bargaining, the Parliament intensified its contacts with the Council substructure and the Commission via informal *trialogues*. At the same time, it increasingly agreed on legal acts during the early stages of the legislative procedure, thus forfeiting opportunities for open plenary debates.⁴⁵ As a Council official explains:

⁴¹ Sasse 1972, 88. Here and in the following, all translations from the original are mine.

⁴² On Coreper see Lewis 2005. To be sure, this does not mean that issues are never discussed at the ministerial level.

Ministers often refer dossiers back to the substructure with further instruction and the task of finding a consensus.

⁴³ Hayes-Renshaw and Wallace 2006, 53.

⁴⁴ Culley 2004, 201-204.

⁴⁵ Farrell and Héritier 2004, 1194-1999.

[*Trialogues*] make it possible to speak more frankly and to explain what the underlying reasons are. You also can say: here is a real problem – we cannot go any further than this, please recognize this [...].⁴⁶

Finally, the formal rules allow for the delegation of implementation powers to the Commission and provide no means for the Council to withdraw and change effective measures. However, except in agricultural matters and competition policy, where the treaty confers these powers directly upon the Commission, governments usually reserve the implementation of policies for their national administrations.⁴⁷ And in the event that the Commission is endowed with implementation powers, a number of informal governmental committees (*Comitology*), which emerged in the early 1960s, monitor its action and often limit its discretion substantially.⁴⁸

Informal governance in voting

Liberal Regime Theory expects informal governance in voting to vary systematically with domestic uncertainty: governments will refrain from majority voting and instead seek consensual outcomes in all EC issue-areas except in agricultural matters, an issue-area of comparatively low domestic uncertainty. This expectation is at odds with power-based explanations, which predict informal governance to emerge in the predictably sensitive CAP, as well as with classic regime theoretical explanations that expect informal governance to emerge across-the-board in response to the general increase in transaction costs during the late 1960s. Interestingly, the hypothesis also contradicts conventional wisdom, which similar to the power-based explanation holds that France forced a persistent veto-culture upon its partners through the so-called "empty chair crisis" of 1965. The crisis was precipitated by a Commission proposal, which hit a raw nerve with France by *inter alia* extending the scope of OMV in agricultural and related budgetary matters. It unfolded in full when the then French President, Charles De Gaulle, demanded (under threat of withdrawal from the EC) the reintroduction of national vetoes in cases where a country considered its "very important interests" to be at stake. The infamous "Luxembourg Compromise" supposedly epitomized this veto culture until the member states purportedly abandoned it twenty years later with the adoption of the Single European Act.⁴⁹

Yet, neither conventional wisdom nor the alternative explanations bear up against the empirical record. Contrary to conventional wisdom, the variation in informal governance in voting across issue-areas is far more pronounced than the variation over time. And contrary to classic regime theoretical and power-based alternative explanations, informal governance in voting emerges where domestic uncertainty is high, not where issues are of a predictable sensitivity to powerful states or where transaction costs rise. To begin with, governments had refrained from majority voting even before the crisis unfolded in 1965. At this point, the Council had virtually no experience of majority voting despite the fact that it had already been established for 88 provisions.⁵⁰ After eight years and the adoption of more than 500 legal acts, a total number of only four to thirteen decisions had been taken by a majority vote.⁵¹ Practitioners thus spoke of a

⁴⁶ Quoted in Farrell and Héritier 2004, 1199.

⁴⁷ Franchino 2007, 86-87. Commission and EP have contested the legality of this practice.

⁴⁸ See e.g. Pollack 2003, 114-145.

⁴⁹ For a prominent example see Garrett and Tsebelis 1996, 280-283.

⁵⁰ Ophüls 1966, 193.

⁵¹ Auswärtiges Amt 1965, 1, Vertretung der BRD bei der EWG 1965a.

horror majoritatis governing the Council.⁵² In an internal paper discussing De Gaulle's threat of withdrawal, the German Foreign Ministry notes with bemusement:

The rule has always been in practice that decisions are unanimous even if the treaty provides for majority voting. We simply usually negotiate until we have reached an agreement. There is no reason to believe that we would suddenly discontinue this practice just because the scope of QMV is being extended [...].⁵³

Accordingly, De Gaulle's public onslaught on QMV was secretly regarded as a pseudo debate on a false problem.⁵⁴ The principal controversy between France and its cooperating partners was not the fact that governments in distress ought to be accommodated, but the question of how the cooperating partners should assess the need for discretion. France insisted on an arrangement, similar to that of unilateral escape, in which formal majority voting was void in the event that it threatened to jeopardize a member state's "very important interests". Her cooperating partners strongly objected to the proposal on the grounds that it was impossible to define the term "very important interests" in advance and that leaving this assessment up to the claimant country would undermine "the functioning of the Community" and "in effect result in the abolition of the majority principle."⁵⁵ The Dutch foreign minister, Joseph Luns, also strongly cautioned against the French demands to codify the custom of consensus decision-making on the grounds that its formalization would encourage even more domestic demands for defection:

[The French formula] puts the governments in a thorny situation at the domestic level, because they will face great difficulty resisting all kinds of pressure, never missing any opportunity to demand a veto on this or that national interest, no matter how unimportant.⁵⁶

The Six ultimately agreed to disagree. The Luxembourg Compromise states very ambiguously that while France insisted that the Council decide by unanimity when a state's vital interests are at stake, her partners would only try to find a consensus "within a reasonable time". All delegations "note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement."⁵⁷ Thus, majority voting in fact remained an option that practitioners agreed was "never ousted from the delegations' minds."⁵⁸ Consistent with LRT, but contradicting the power-based explanation for informal governance, contemporary sources also agree that majority votes did take place from time to time, and predominantly so on agricultural and some budgetary matters.⁵⁹

The conclusion of the "compromise" coincided with the beginning of a dramatic increase in the Council's legislative activity (see graph 1), which in combination with the upcoming first EC enlargement to the United Kingdom and Denmark in 1973 raised strong concerns about an imminent blockage of decision-making. The then president of the Commission, Jean Rey, consequently called on the member states to renounce the compromise and apply the treaty rules in the future.⁶⁰ His demand met with a cool reception from all six delegations.⁶¹ The German

⁵² Houben 1964, 112-115. Cf. Noël 1963, 19.

⁵³ Auswärtiges Amt 1965, 2.

⁵⁴ Représentation Permanente de la Belgique 1966a, 3. Cf. Rutten 2006, 6:35.

⁵⁵ Auswärtiges Amt 1965, 3-4.

⁵⁶ Représentation Permanente de la Belgique 1966b, 5.

⁵⁷ European Communities 1966.

⁵⁸ Sasse 1975, 142-143.

⁵⁹ See Kranz 1982, 418. Cf. Torrelli 1969, 86, Sasse 1975, 136.

⁶⁰ Conseil des CE 1970, 3.

Foreign Minister, Walter Scheel, explained to Rey that he agreed on the importance of majority voting in principle. But he emphasized that the disagreement at Luxembourg in fact provided added flexibility that was necessary for the Council to sustain the level of cooperation:

Nonetheless, we found a felicitous solution in 1966, a formula that is just ambiguous enough for the Community to make important progress. We would not have reached our current, delicate equilibrium with a simple Council decision, and we therefore need to continue to strive for solutions that we can all accept.⁶²

As complaints about the legislative backlog resulting from the leap in legislative activity grew louder, the governments nevertheless began to reexamine their decision-making practices. This partly corroborates classic regime theory, which expects governments to adapt their decisionmaking practices in response to an increase in transaction costs. For example, they called on the Council substructure to take more preliminary decisions.⁶³ Furthermore, individual delegations increasingly abstained from final decisions in order to enable their partners to attain unanimity and thus change the Commission proposal.⁶⁴ They also increasingly had recourse to majority voting.⁶⁵ In 1977, the Commission notes that "majority voting in the Council has been extended pragmatically."66 Jean-Louis Dewost, the Council's Jurisconsult, reports a few years later: "We have moved from a few isolated votes each year to about ten in 1980, twenty-odd in 1982, about forty in 1984 and again in 1985, and almost eighty in 1986."⁶⁷ These developments notwithstanding, in the Council the search for consensus in fact remained the norm and majority voting the strong exception. When majority voting peaked in 1987, only ninety-six out of more than 800 legal acts were adopted by QMV.⁶⁸ Drawing on newly released official data, Fiona Hayes-Renshaw and colleagues find that between 1998 and 2004, only about 20% of all decisions that were formally subject to QMV were explicitly contested by one or two governments.⁶⁹ Although reliable data are still scarce, the recent accession of new members does not seem to have affected this practice substantially.⁷⁰

Importantly, and confirming LRT, the above-described variation over time is far less pronounced than the very strong variation across issue-areas. Qualitative data from the 1960s suggest that governments were more ready to have recourse to majority voting on matters concerning the CAP (then including fisheries) and related budgetary questions. The available semi-official data for the 1980s corroborate that majority voting was "particularly pronounced in agriculture and fisheries".⁷¹ For example, the German Permanent Representative, Werner Ungerer, reports that more than 60% of all majority decisions in 1986 were taken on agricultural matters, followed by decisions on the common trade policy (20%).⁷² Hayes-Renshaw and

⁶¹ Auswärtiges Amt 1970, 2.

⁶² Conseil des CE 1970, 7.

⁶³ European Council 1974.

⁶⁴ Council of the EC 1973, 12.

⁶⁵ European Commission 1977, 34, European Communities 1978b, 13.

⁶⁶ European Communities 1978a.

⁶⁷ Dewost 1987, 174. Cf. European Communities 1986.

⁶⁸ Ungerer 1989, 98. Cf. Engel and Borrmann 1991, 147.

⁶⁹ Hayes-Renshaw, et al. 2006, 163. Cf. Heisenberg 2005, 72, Mattila and Lane 2001, 42.

⁷⁰ Best and Settembri 2008, 45.

⁷¹ Dewost 1987, 174.

⁷² Ungerer 1989, 98.

colleagues show that for the 1990s and 2000s more than 40% of all majority votes were taken on agricultural matters, followed by 12% on matters concerning the Internal Market.⁷³

In sum, the empirical record lends strong support to LRT. Consensus decision-making has always been the norm in the Council, and the variation in this practice of informal governance across issue-areas is much stronger than the variation over time, with agriculture, an issue-area of low domestic uncertainty, being a strong and regular exception to the norm. Qualitative data show that governments indeed refrained from overruling their partners in order to exercise discretion with a view to sustaining integration in the long run. As Dewost put it:

[...] while it is true that the treaty confers certain competences from the member states on the Community, (...) it is the national governments to which [citizens and] the firms that are affected by these decisions turn. And it is the governments that face their reactions – politically or, in extreme cases, by having to maintain public order. This is the reason why all actors participating in the Community game implicitly agree that it is necessary to strive for a reasonable consensus.⁷⁴

Alternative theories cannot account for this phenomenon. The practice of consensus decisionmaking did not emerge across the board in response to the rise in transaction costs in the late 1960s, as classic regime theory predicts. The record also disconfirms power-based explanations of informal governance, which expect informal governance to arise in the CAP, an issue-area of predictably high sensitivity to a powerful member state like France. On the contrary, governments frequently overrule recalcitrant countries on agricultural matters, even though this is the issue-area for which the French President De Gaulle had originally demanded the abolition of majority voting.

Adjudication in European decision-making

The previous section illustrated the pervasiveness of informal governance in EC issue-areas of high domestic uncertainty. However, due to the aforementioned problem of equifinality in institutional analysis, this cannot suffice to corroborate the theory. It is only by probing more than one of its observable implications that we increase confidence in our findings. This section therefore evaluates the second hypothesis we derived from LRT: in order to prevent moral hazard and elicit situational information about the actual extent of interest group pressure, governments systematically delegate the task of adjudicating on demands for accommodation to a government that, while it gains from sustaining a deeper level of cooperation in the long run, stands to lose from excessive concessions.

This hypothesis was specified for the institutional context of the EC. Instead of delegating adjudicatory authority on a case-by-case basis, governments structure the legislative agenda in a way as to enable a single government to assume this adjudicatory function for a certain period of time. Liberal Regime Theory therefore expects, firstly, that the norm of discretion brings about a central role for the Presidency in decision-making and, secondly, that governments drop issues from the agenda when the Presidency is expected to collude with the government claiming to be facing unmanageable interest group pressure. These expectations are again at odds with alternative explanations of informal governance. Power-based explanations would not expect

⁷³ Hayes-Renshaw, et al. 2006, 170.

⁷⁴ Dewost 1987, 174.

large states to subject their use of informal governance to adjudication by another government or to structure the agenda in such a way as to enable another government to assume such a role. Although classic regime theorists do expect the Presidency to assume a central role in decisionmaking, they expect this to take place, in line with the conventional wisdom about the Council Presidency, in response to a rise in the transaction costs of EC decision-making in the late 1960s.

The norm of discretion and adjudication by the Council Presidency

Does the norm of discretion generate a central role for the Presidency in decision-making? As mentioned, the Rome Treaty provided for Council negotiations to take place under the auspices of the Council Presidency, a position rotating on a six-monthly basis among governments, with the innocuous task of chairing meetings. To the surprise of all negotiating actors, the Presidency soon assumed a far more central role in decision-making by adopting three practices:⁷⁵ intense contacts with recalcitrant delegations; the preparation of compromise proposals; and the prerogative to call a vote. The Presidency adopted the first practice – intense contacts with recalcitrant governments - very shortly after the treaty became effective. For example, an internal analysis of the 1964 German Presidency stresses the utmost importance of obtaining, with the assistance of the Council Secretariat, information about the "motives and problems of individual delegations".⁷⁶ This information was the prerequisite for the second practice, the preparation of compromises between governments in order to unanimously change the Commission proposal under discussion. These suggestions soon became known as "presidency compromises" - a term that appears in Council documents as early as the beginning of the 1960s.⁷⁷ The Commission, in turn, was asked to uphold the position that it considered most in line with the treaty objectives while the chair, as Emile Noël explains,

[...] has the most scope for quietly taking soundings, putting out feelers, and coming forward at the right moment with compromise suggestions – particularly suggestions some distance away from the Commission's original proposal.⁷⁸

Interestingly, supporting LRT, the Presidency played a comparatively reticent role in decisionmaking on agricultural matters, whereas the Commission is usually central in pushing towards the conclusion of negotiations in the Council. A German official confirms: "What is elsewhere called a 'presidency compromise' is in the CAP in fact a proposal made by the Commission."⁷⁹

In the absence of a norm of discretion, one would expect the Presidency's central role in decision-making to fade away with the aforementioned trend towards majority voting from the mid-1970s onwards. Instead, this only served to accentuate the Presidency's importance by generating a third practice, the prerogative to call votes.⁸⁰ The so-called "Three Wise Men", a high-profile group appointed by the European Council in the late 1970s to analyze the functioning of the institutions, explain the link between the norm of discretion and this practice as follows:

Each state must remain the judge of where its important interests lie. Otherwise it could be overruled on an issue which it sincerely considered a major one. It is only when all states feel sure that this will not happen that they will all be willing to follow normal voting procedures. [...] The application of these

⁷⁵ Mégret 1961, 636, 646.

⁷⁶ Vertretung der BRD bei der EWG 1965b, 5. Cf. Noël 1967, 238.

⁷⁷ E.g. Vertretung der BRD bei der EWG 1964, 1.

⁷⁸ Noël and Étienne 1971, 437-438. Cf. Dewost 1984, 32, Ponzano 2002, 50.

⁷⁹ Author's Interview, Brussels, 12 December 2007. Cf. Culley 2004, 205.

⁸⁰ Torrelli 1969, 91. Cf. Noël and Étienne 1969, 47.

solutions lies in the hands of the Presidency. The Chairman of the Council is best placed to judge whether and when a vote should be called.⁸¹

There is no indication that any of these three practices – liaising with recalcitrant delegations, proposing compromises, and calling votes – has changed over time. In fact, the Presidency's centrality in decision-making was further accentuated as it now, on the Council's behalf, conducts negotiations with the EP in the aforementioned *trialogues*.⁸² In sum, and corroborating LRT, the Presidency assumed a central role in Council decision-making as a direct result of the norm of discretion.

The Council Presidency and the legislative agenda

Assuming that decision outcomes mainly vary along a single dimension with regard to the degree of supranational delegation, with the Commission proposal usually being at the integrationist side of the spectrum,⁸³ the Presidency can be expected to be facing an incentive to collude with the claimant government if it also prefers to make substantive changes to a proposal under discussion in the Council. How do governments structure the legislative agenda in order to prevent this conflict of interests and enable the Presidency to assume its adjudicatory function? We discussed above that although the Community method formally provided the Commission with the opportunity to determine the timing of proposals, governments resumed this power by passing the proposal to its experts in the Council substructure. This in turn afforded governments the opportunity to structure the Council agenda according to new priorities. In 1960, they informally agreed that the "[...] choice of important subjects, which merit discussion in the Council, ought to be conferred to the Presidency [...].³⁴ The Presidency was consequently able to prioritize preferred issues and, *ceteris paribus*, let others slide.⁸⁵

Practitioners report, and statistical analyses confirm, that the Presidency usually neglects Commission proposals to which it is indifferent or which it opposes.⁸⁶ The reason for dropping disliked Commission proposals from the legislative agenda is, in accordance with LRT, that while it is expected to respond to recalcitrant delegations, the Presidency's own demands to change the Commission proposal categorically go unheeded.⁸⁷ For example, the German Permanent Representative describes a lesson learned during the fifth Presidency as follows: "It again proved true that the Presidency has little possibility to assert its interest. Attempts to use its privileged position for national purposes would meet with sensitive and strong refusal."⁸⁸ In light of this, there is no alternative for the Presidency but to keep this dossier off the agenda until the next government takes over.⁸⁹ Other issues consequently move forward.

The Presidency maintains its control over the micro-management of the agenda despite other influences (e.g. the European Council) on the legislative program. To give an example, an internal document of the British Foreign and Commonwealth Office instructed its officials in the

⁸¹ Council of the EC 1980, III, 4b. Cf. Dewost 1983, 78-79.

⁸² For a description of current practices see Hayes-Renshaw and Wallace 2006, chaps 5 and 8.

⁸³ This is a standard assumption in EU studies.

⁸⁴ Communauté Économique Europénne 1960, item 9.

⁸⁵ van Rijn 1972, 653. See also Noël 1967, 237 and Van der Meulen 1966, 12.

⁸⁶ Warntjen's (2007, 1152) statistical analysis confirms that the agenda features a Presidency bias, i.e. the Presidency is less likely to include topics it dislikes.

⁸⁷ See Vertretung der BRD bei der EG 1971, 35, Vertretung der BRD bei der EWG 1965b, 5. Cf. Council Secretariat 2006, 4.

⁸⁸ Vertretung der BRD bei der EG 1971, 35.

⁸⁹ Wallace and Edwards 1976, 544.

1980s on subtle tactics for controlling the legislative agenda such as "rambling on" or deliberately creating chaos with the booking of rooms, etc. These tactics are considered entirely appropriate by all governments, as a British official explains: "Everyone in the community uses the kind of maneuvers or procedures that were mentioned in the paper [...]."⁹⁰ A former Permanent Representative confirms that all governments generally accept the Presidency's special influence on the agenda:

Nobody cares if the Council agenda adequately balances the governments' various interests or anything like that. It's as simple as that: Governments decide what needs to be decided and what the Presidency thinks is important.⁹¹

The case of the so-called "End of Life Vehicles Directive" illustrates that the Presidency adjudicatory authority is dependent on its distance from the countries that demand discretion. This directive *inter alia* stipulated common take back duties for the automobile industry. Initially, only Spain and the United Kingdom voiced opposition to the plan while the majority of governments, including the newly elected German government, backed the Commission proposal.⁹² Negotiations in the Council substructure and with the EP did not make much progress under the recalcitrant UK Presidency in the first half of 1998. The Austrian Presidency, in the second half of 1998, consequently inherited responsibility for finding an agreement among the member states. Under its chairmanship, the Council substructure prepared a compromise text that all delegations were ready to accept.⁹³ The German Minister for the environment, Jürgen Trittin (Die Grünen), announced that the adoption of this directive would be a key policy goal for Germany's upcoming term in charge of EU business.⁹⁴ Yet, shortly after Germany took over from Austria, Chancellor Schröder (SPD) suddenly revoked his support for the proposal after a direct intervention by the CEO of Volkswagen, Ferdinand Piëch, who feared extensive adjustment costs for the automobile industry. Schröder invoked his prerogative as Chancellor to define Germany's policy guidelines and instructed Trittin to negotiate changes to the directive.⁹⁵ While the UK and Spain saw this as an opportunity to renegotiate the terms of the directive, other delegations regarded this maneuver as an abuse of the Presidency's authority. The other delegations threatened that if the German Presidency indeed tried to vote down the proposal in its current form, they would deprive it of its vote-calling prerogative.⁹⁶ Trittin then decided to discuss the dossier in a highly restricted session where he demanded concessions to the automobile industry. Because one television camera was still recording, the European Voice was able to report the highlights of the exchanges between the Ministers:

Fascinated journalists gathered round the screen as Trittin harangued ministers for refusing to accept his new 'compromise' proposal. [...] 'What are you doing trying to talk us into a compromise when you are the problem?' asked the Austrian Environment Minister, Martin Bartenstein. Denmark's Sven Auken was almost screaming with anger and France's Dominique Voynet boomed: 'We cannot leave this room to tell the press and the public that we have dropped our trousers for the car industry!'⁹⁷

⁹⁰ International Herald Tribune, 16 February 1987, 10.

⁹¹ Author's interview with a former German Deputy Permanent Representative, Brussels, 1 February 2008.

⁹² Agence Europe, EU/Environment, 25 June 1999.

⁹³ Council of the EU 1998, 3.

⁹⁴ European Voice, 17 June 1999, 1.

⁹⁵ European Voice, 17 June 1999, 1.

⁹⁶ Agence Europe, EU/Environment, 25 June 1999.

⁹⁷ European Voice, 1 July 1999, 1.

In light of this strong reaction, the German Presidency decided to note the impossibility of securing a qualified majority in favor of the text and to pass the issue on to the subsequent Finnish Presidency for further discussion.⁹⁸ The Finnish Presidency then quickly called a qualified majority against a recalcitrant German delegation, as it was obvious that the domestic pressure the German government was facing was far from unmanageable.⁹⁹

Summary

This section corroborated the second hypothesis derived from LRT about the role of the Presidency as an adjudicator of discretion. First, it demonstrated that the norm of discretion brought about a central role for the Presidency as early as the beginning of the 1960s. Specifically, the Presidency's practices – contacts with recalcitrant delegations, preparation of compromises, and the prerogative to call votes – allow it to assess the amount of discretion that is necessary to render domestic pressure manageable again. This contradicts classic regime theoretical expectations and conventional wisdom that the role of the Presidency developed in response to a general rise in decision-making transaction costs during the late 1960s. Second, the section demonstrated that the Presidency is granted adjudicatory authority only when it has no incentive to collude with a claimant government, in which case dossiers are temporarily dropped from the legislative agenda until the next Presidency takes over. This in turn contradicts powerbased theories, which would not expect powerful states to subject their use of informal governance to another government's adjudication and to structure their agenda accordingly.

Conclusions

Informal governance abounds in the EU, the arguably most advanced international organization to But why would governments depart from formal rules they designed with foresight? date. Drawing on the literature on cooperation in the face of uncertainty regarding future domestic demands for protection, this article provided an explanation of the phenomenon of informal governance that is both original and intuitive: in order to maintain their highly beneficial depth of cooperation, European governments have adopted a norm of discretion that prescribes that governments accommodate cooperating partners that face unmanageable domestic pressure for defection. All governments consequently adopt practices of informal governance in parallel to formal rules as they collectively exercise discretion. Yet, because some governments might be tempted to exploit the norm, they have delegated the task of adjudicating on discretion to another government that, while having an incentive to grant sufficient discretion, stands to lose from excessive concessions. In short, European member states have developed an intriguing way of making decisions that, based on a mix of formal rules and an informal norm, allows them to embed integration in contingent societal preferences and sustain a depth of cooperation that is unparalleled in modern international politics.

At this point, it is important to note what the theory does not explain. First, while it explains how states maintain their level of cooperation, the theory is silent about why they choose the initial degree of cooperation in the first place. However, LRT suggests that the existence of a

⁹⁸ Agence Europe, EU/Environment, 26 June 1999.

⁹⁹ German car manufacturers subsequently sought support within the EP (*European Voice*, 27 January 1999, 1). The Council and EP then convened a conciliation committee, which reached an agreement that modified the original Council standpoint at the margins (*Agence Europe*, EU/Environment, 26 May 2000).

norm of discretion makes it easier for states to join and to deepen international organizations.¹⁰⁰ Second, the theory does not spell out the process of institutional adaptation that leads governments to adopt the norm of discretion. This issue requires further attention. Nonetheless, the qualitative data presented in this article indicates that this process was intentional as all governments are conscious of the fact that this equilibrium is superior to either formal rules or informal governance alone.

The plausibility of LRT was demonstrated for the case of the EU, but it can be extended to international institutions more broadly. For example, the theory expects the further delegation of authority and the specification of formal rules in areas of domestic uncertainty to go hand in hand with the emergence of informal governance. In addition, given that alternative institutional solutions to domestic uncertainty were found ill-suited to striking an optimal balance between credibility and flexibility, informal governance can also be expected to emerge around existing formal flexibility arrangements. The WTO Dispute Settlement Understanding might be a case in point, since most disputes about the legitimacy of rule violations are resolved in informal consultations before they are brought to the panel.¹⁰¹ It should be noted, however, that the collection of data on informal practices is intricate, even in an intensely researched area such as the EU. But this is an effort worth making, because LRT has important implications for our understanding of institutions in and beyond Europe.

First, Liberal Regime Theory goes beyond the conventional static perspective on international institutions that predominates rational design and principal-agent approaches by taking seriously the insight that for institutions to be effective, they have to be constantly re-embedded in the interests and values of their member states. This embedment is accomplished by the informal norm of discretion, which renders entirely dynamic the balance between rigidity and leeway embodied by the formal rules. Thus, formal rules remain effective throughout, but this effect is ultimately attenuated by the informal norm. This means that the delegation of authority and the empowerment of the EP notwithstanding, member states in fact retain ultimate, collective control of the legislative process to such an extent as to keep undesired distributive effects at the domestic level to a minimum. In light of this, public outcries about Brussels' encroaching powers appear exaggerated.¹⁰²

Second, the claim that the mix of formal rules and informal governance is functional has implications for normative debates about governance in international organizations. The flipside of governments' (second-best) efforts to retain collective control of the domestic distributive effects of cooperation is the opacity and depoliticization of EU decision-making as governments deliberately and informally reduce the saliency of issues. These two aspects of EU politics, its elusive complexity and low saliency, have attracted much criticism in the context of the debate about its "democratic deficit" and led to demands to actively politicize the legislative process. However, these reforms will at best have little effect and at worst jeopardize the EU's constitutional equilibrium. A solution to this lies primarily at the national level, namely in changing national processes in ways so as to disperse excessive adjustment costs from cooperation and make governments more accountable to public interests.

¹⁰⁰ Similarly, Rosendorff and Milner (2001, 836) argue that formal flexibility makes it easier for states to agree on deep cooperation in the first place.

¹⁰¹ Busch and Reinhardt 2000-2001, 161.

 $^{^{102}}$ As do prominent scholarly disputes about the smallest changes to the formal legislative process. Cf. Achen 2006, 296.

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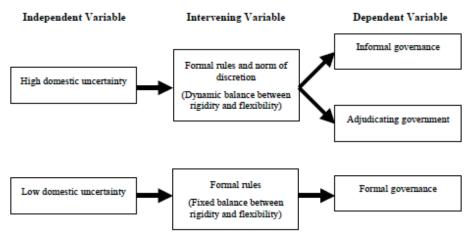
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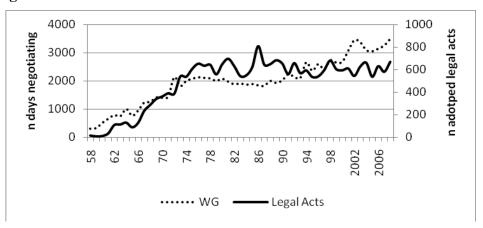
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Figure 1: Causal Pathway







¹⁰³ Data drawn from the Council Annual Reports and Eur-Lex (22 January 2009). The years 2002-2006 are estimates.